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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE FOLGER COFFEE COMPANY,
Petitioner,

v.

INDIAN COFFEE CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE THIRD CIRCUIT'S DECISION WOULD IMPROPERLY ALLOW AN AWARD OF ANTITRUST DAMAGES PREMISED ON PLAINTIFF'S CLAIM THAT IT WOULD HAVE ACTED AS A "PRICE LEADER" TO RAISE PRICES IN A COMPETITIVELY DORMANT AREA.	2
II. THE THIRD CIRCUIT HAS ADOPTED NOVEL, ILLOGICAL, AND ANTICOMPETITIVE STANDARDS FOR PROVING "HARM TO COMPETITION" IN ROBINSON-PATMAN SECTION 2(a) CASES.	3
A. "Predatory Pricing" Requires That A Defendant Possess Or Be Capable Of Achieving Monopoly Power.	5
B. "Predatory Intent" Should Not Be Inferred From A New Entrant's Unprofitability.	5
C. Loss of Sales By An Established Seller Following New Entry Does Not Constitute Actual Harm to Competition.	6
III. THE THIRD CIRCUIT'S DECISION WOULD DESTROY THE AUTHORITY OF TRIAL JUDGES TO ASSESS THE REASONABLENESS OF THE SOURCES UPON WHICH AN EXPERT RELIES IN PRESENTING DAMAGES OPINIONS IN ANTITRUST CASES.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Cases:

Automatic Canteen Co. v. *FTC*, 346 U.S. 61 (1953) 5

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 2, 3

Great Atlantic & Pacific Tea Co. v. *FTC*, 440 U.S. 69 (1979) 5

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004) 7

Malcolm v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981) 3

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 5

Utah Pie Co. v. *Continental Baking Co.*, 386 U.S. 685 (1967) 5

Statutes:

15 U.S.C. § 13(a) 3, 5, 8

15 U.S.C. § 15(a) 2, 3, 8

Rules:

Rule 703 of the Federal Rules of Evidence 1, 7, 8

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Indian Coffee's brief in opposition to Folger's petition offers dramatic and eloquent proof of why this case merits review by the Court. First, Indian Coffee openly embraces the inherently anticompetitive antitrust theories described in Folger's petition. Thus, the important issues raised by Folger are presented here in a vivid clash both as to fundamental antitrust policy and as to substantive Robinson-Patman and remedial Clayton Act law.

Second, while the Third Circuit's opinion dealt with the antitrust issues in a cryptic and superficial manner (in contrast to its lengthy discussion of the Rule 703 evidentiary issue) nevertheless, Indian Coffee's brief confirms that the antitrust issues presented for review by Folger are indeed the crux of this case.

Third, Folger's petition identifies the serious conflict between the Third Circuit's decision and decisions of this Court, other Courts of Appeals, and the Federal Trade Commission.

Surprisingly, Indian Coffee's brief relies on cases that, if anything, deepen the conflict on the dispositive antitrust issues.

I. THE THIRD CIRCUIT'S DECISION WOULD IMPROPERLY ALLOW AN AWARD OF ANTITRUST DAMAGES PREMISED ON PLAINTIFF'S CLAIM THAT IT WOULD HAVE ACTED AS A "PRICE LEADER" TO RAISE PRICES IN A COMPETITIVELY DORMANT AREA. (QUESTION PRESENTED NO. 1)

Indian Coffee's damages were all calculated on the basis that it could have instantaneously realized dramatically enlarged profits by raising its prices without any loss of sales volume. This was in turn premised on Indian Coffee's claim that it had a legally protected right as an entrenched seller in Pittsburgh to act as a "price leader" in raising prices to non-competitive levels in cooperation with other sellers. This Court should review the decision below because the Third Circuit has approved this unacceptable theory of Clayton Act § 4 antitrust damages. As explained in the Petition (at 9-12), it is necessary and appropriate to grant certiorari, not just because such a damages theory is inherently speculative, but also because it perverts the antitrust treble damage remedy. The Third Circuit's decision on this question is clearly at odds with *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and numerous cases from other circuit courts.

It is significant to note that Indian Coffee apparently now concedes the key points on which Folger's petition relies with respect to Question 1 — to wit,

(1) that the "price leadership" damages theory described by Folger is indeed the theory relied on by Indian Coffee and approved by the Third Circuit; and

(2) that there is a clear conflict between the Third Circuit and other appellate courts as to the propriety of such a theory.

Despite these troublesome propositions, Indian Coffee argues that certiorari should be denied because *Brunswick* is inapposite (Brief at 15), and in any event such a "price leadership" damages theory is legally permissible (Brief at 15, 25-26) under a Fifth Circuit decision, *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981). Indian Coffee's efforts to distinguish *Brunswick* are unpersuasive. As numerous Courts of Appeals have held, *Brunswick's* requirement that Clayton Act § 4 damages be awarded only for injury of the sort that the antitrust laws are intended to prevent would obviously preclude a recovery of damages based on a claim that the defendant's conduct prevented the plaintiff from raising prices and thereby obtaining increased oligopoly profits. The *Malcolm* case simply does not address this point, much less support Indian Coffee's position. But in any event, even if *Malcolm* were on point, this would only increase conflict among the circuits.

In short, the Third Circuit has endorsed Indian Coffee's anticompetitive damages theory, and Indian Coffee has now unabashedly asserted once again, that it is entitled to three times the amount of the increased oligopoly profits it allegedly could have obtained by leading prices upward in Pittsburgh, but which it was prevented from obtaining because of the increase in competition following Folger's new entry. Folger respectfully submits that its first question for certiorari could hardly be more sharply presented than in this case — nor more deserving of this Court's review and reversal.

II. THE THIRD CIRCUIT HAS ADOPTED NOVEL, ILLOGICAL, AND ANTICOMPETITIVE STANDARDS FOR PROVING "HARM TO COMPETITION" IN ROBINSON-PATMAN SECTION 2(a) CASES.

As explained in the Petition (at 9-20), the decision below is anticompetitive because it endorses Indian Coffee's contention that "harm to competition" may be shown by evidence of

nothing more than (a) sales below cost by a new entrant with a 12% share and no reasonable expectation of ever achieving monopoly power, or (b) loss of market share by existing sellers following a new competitor's entry. Not only are these propositions illogical, but in effect they establish virtual "automatic liability" under the Robinson-Patman Act for all entrants and, thus, would discourage pro-competitive new entry. Moreover, each such proposition conflicts with decisions of this Court, other circuit courts, and the FTC.

Again, with respect to Questions 2, 3 and 4 in the Petition, it is important to note what Indian Coffee's Brief does not contest — to wit,

(1) that each of the propositions described in the petition was indeed approved by the Third Circuit;

(2) that the evidence at trial was as described in the Petition, in that Folger did not have and could not anticipate acquiring monopoly power;

(3) that the Third Circuit accepted the inference of "harm to competition" from a new entrant's almost inevitable unprofitability;

(4) that the Third Circuit illogically relied on Indian Coffee's loss of market share as proof of "actual harm to competition";

(5) that the decision below creates a grave threat of "automatic liability" for new entrants, which will have a serious "chilling effect" on pro-competitive entry; and

(6) that on all of these points there is a clear conflict between the decision below and other circuit court decisions.

A. "Predatory Pricing" Requires That A Defendant Possess Or Be Capable Of Achieving Monopoly Power (Question Presented No. 2)

Without explanation, Indian Coffee asserts that all the courts and commentators (see authorities cited in Petition at 15-16) are wrong in defining "predatory pricing" to require some reasonable expectation on the part of the alleged predator that he will be able to obtain a dominant market position, thereby allowing recoupment of his losses through future supra-normal profits. According to Indian Coffee (Brief at 17-18), the Third Circuit has rejected such a "curious" or "unusual" requirement because neither Robinson-Patman § 2(a) nor *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), requires it. This simply highlights why review is necessary, since Folger's position is not at all "unusual," but is indeed the predominant view in the lower courts other than the Third Circuit. Folger submits that neither Section 2(a) nor *Utah Pie* precludes the courts from defining "predatory pricing" to require a threshold showing that a defendant has or might expect to attain monopoly power. Indeed, not to require such a showing would almost certainly have a chilling effect on vigorous price competition by smaller competitors and would thus create a fundamental conflict in policy between the Robinson-Patman Act and the Sherman Act.[1] This is an important question concerning enforcement of the antitrust laws which merits this Court's consideration.

B. "Predatory Intent" Should Not Be Inferred From A New Entrant's Unprofitability (Question Presented No. 3)

Indian Coffee's argument on this issue is an obvious "straw man." Folger has never claimed that new entrants have

[1] This Court has repeatedly warned against creating such conflicts by reading the Robinson-Patman Act in an anticompetitive manner. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979).

blanket antitrust immunity. Rather, the questions presented are whether a judicially created evidentiary rule (the "double inference") can logically be applied in the new entry context, and whether such a rule should be rejected as to a new entrant because of its obvious anti-competitive effects. (Petition at 17-18) These are very significant antitrust policy questions, and Indian Coffee has failed to give *any* reasons why this Court should not grant certiorari to consider such issues.

C. Loss of Sales By An Established Seller Following New Entry Does Not Constitute Actual Harm to Competition (Question Presented No. 4)

Indian Coffee apparently concedes that the Third Circuit relied upon the theory that loss of sales by an established seller following a new market entry is proof of harm to competition. Instead of attempting to defend that position, which is in clear conflict with established law and simple economics (Petition at 19-20), Indian Coffee presents a number of factual assertions concerning its supposed proof of "actual harm to competition."[2] However, those contentions were all rejected by the trial court and ignored by the Court of Appeals. Consequently, they are *not* at issue here. The only question here is whether the opinion below adopted an improper standard for proving harm to competition by holding that Indian Coffee's loss of sales, of itself, constitutes "actual competitive injury." Indian Coffee has given this Court no reason why this manifestly incorrect rule of law should not be reviewed.

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[2] For the most part, these contentions relate to alleged loss of sales share by other competitors (the same issue as is presented with respect to Indian Coffee) or to increased domination of the Pittsburgh sales area, not by Folger, but rather by General Foods, the competitor which raised its market share to over 60% during the relevant time period.

III. THE THIRD CIRCUIT'S DECISION WOULD DESTROY THE AUTHORITY OF TRIAL JUDGES TO ASSESS THE REASONABLENESS OF THE SOURCES UPON WHICH AN EXPERT RELIES IN PRESENTING DAMAGES OPINIONS IN ANTITRUST CASES. (Question Presented No. 5)

Indian Coffee's argument on the evidentiary issue barely mentions Rule 703 and totally ignores the Third Circuit's questionable interpretation of the Rule in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004), and this case. (Petition at 21-24) Again, what Indian Coffee concedes with respect to Question 5 is significant — to wit,

(1) that there is a clear conflict among the circuits on the question presented;

(2) that the Third Circuit's reading of Rule 703 deprives District Judges of the discretion to exclude patently improper expert testimony; and

(3) that all of Indian Coffee's damages experts relied upon a critical and (under established antitrust precedents) improper pre-trial opinion of its owner which he retracted at trial.

The arguments advanced by Indian Coffee to justify denying certiorari are not persuasive. First, Indian Coffee presents supposed factual support for its experts' assumption that 14% might be a "normal" trade allowance level. (Brief at 24-35) This misses the point entirely. The critical issue is not whether 14% is "normal," but rather *whether Indian Coffee could have instantly reduced its allowances* from 23% to that supposed "normal" 14% level (i.e., increased prices) *without losing any sales*. This is obviously a marketing question on which *none* of Indian Coffee's experts even purported to give an opinion; they all relied, as the District Judge found, on

Mr. Deily's pre-trial opinion, which he himself thereafter abandoned during trial! Indeed, Mr. Deily conceded, not just that the reduction in allowances could not be accomplished instantaneously, but also that it might not be possible at all! (43A-44A)

Second, Indian Coffee argues that it is reasonable for experts to assume that sellers in a "price leadership" situation (such as pre-Folger Pittsburgh) will "maximize profits" by cooperatively raising prices. As previously discussed (at 3-5, above), such an agrument cries out for this Court's rejection. Such a Clayton Act § 4 damages theory is not legally permissible. The Third Circuit held that expert testimony relying on such a legally improper assumption *must* be admitted merely because the expert thinks it is reasonable. It is obvious that a reading of Rule 703 which requires such admission of patently improper testimony *must* be incorrect, not just as a matter of substantive antitrust law and policy, but as a matter of evidentiary law. This, this is an especially appropriate case for this Court to resolve the conflict between the Third Circuit and other courts as to the proper reading of Rule 703.

CONCLUSION

Essentially, it is Indian Coffee's position, based on its argumentative interpretation of the facts of this case, that the Third Circuit's decision was correct. But Indian Coffee's Brief does not address — much less rebut — Folger's argument that certiorari should be granted. Indeed, Indian Coffee's Brief confirms both the importance of the questions presented in the petition and the conflict among the circuits regarding these questions. The Third Circuit's decision is fundamentally at odds with basic antitrust law and policy. Its interpretation of Robinson-Patman Act § 2(a), Clayton Act § 4, and Rule 703 threaten to do substantial mischief in future antitrust cases unless reviewed and reversed by this Court.

As stated in Folger's petition, the FTC has exhaustively investigated the specific facts and circumstances underlying the

action brought by Indian Coffee in this case. Its findings and decision are in irreconcilable conflict with the opinion of the Third Circuit as a matter both of substantive law and antitrust policy. Folger respectfully suggests that the Court may wish to seek the views of the FTC, as the agency charged by Congress with the primary responsibility for enforcement of the Robinson-Patman Act, as to whether certiorari should be granted with respect to these important issues.

Respectfully submitted,

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